Supreme Court, U. S.
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80-122

In the

Supreme Court of the United States

OCTOBER TERM, 1980

No.

LEWIS C. SPARKS,

Petitioner,

vs.

THE WESTERN SHORE PUBLISHING CORPORATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

LEWIS C. SPARKS
626 E Street, S.E.
Washington, D.C.

Petitioner

QUESTIONS PRESENTED

1. Does the "Herbert Standard" permit summary judgment in a Libel case based on so little discovery?

2. Did this publication of scandalous allegations which threatened public safety comprise a reckless disregard for the truth?

3. Does the "Times Standard" apply to this case?

21(b) footnote: The only party not listed on the front cover is co-defedant newspaper columnist Gabriele Barmash

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). The U. S. Court of Appeals for the District of Columbia Circuit judgment per curium Feb. 6, 1980. Timely petition for rehearing and hearing en banc was denied March 27, 1980. Petitioner's timely motion to this Court for a 30 day extension of time to file this petition was granted extending time to and including July 25, 1980.

STATEMENT OF THE CASE

In the Spring of 1978 I was engaged in the business of selling ice cream, candy and sodas from a truck in Prince Georges County, Maryland.

The Good Humor vendor told me, 'you are undercutting me—get off my territory or I will report you to Maryland government authorities. Less than two weeks later the first of two articles appeared in the Maryland Independent Newspaper. The articles

alleged many heinous acts pertaining to two vendors (from selling cigarettes to minors to child molesting). About two weeks after the second article an angry mob surrounded my truck shouting things from the articles. Then they started to do damage to my truck and subsequently the truck burned up in a fire.

They had several police officers and a Maryland states attorney working on it but they found no violation of law pertaining to me. The allegations were all false in reference to me and in addition I do not smoke cigarettes and did not smoke cigarettes in 1978.

Gabriele Barmash, the newspaper columnist gave money and instructions to a youth to produce a sale of cigarettes to a minor by the other vendor Richard Cain (entrapment). A claim was made that they had influence in the government and the said Richard Cain was convicted even though entrapment was proved in open court. The entrapment is in the record of this case in the Barmash deposition.

AT THIS POINT I SUGGEST THAT THE READER READ THE ARTICLE OF MAY 18, and the accompanying statement of Chief Counsel Charles V. Kirchman, Esquire in which he states that the articles deal in part with the subject of sex perverts driving ice cream trucks. (Fold out in back of booklet)

In reference to the last sentence of Chief Counsel's statement, I have never "contanded" that the public identified me merely because I was a truck vendor. I brought this action in the Federal District Court under diversity of citizenship as basis for jurisdiction.

REASONS FOR GRANTING THE WRIT

1. Does the "Herbert Standard" permit summary judgment in a Libel case based on so little discovery?

The recent Herbert decision (Herbert vs. Lando, 1979, 441 US 153) of this Court has set a new standard for summary judgment requiring extensive discovery in Libel cases when the "Times Standard" applies.

The Lando deposition alone was almost 3,000 pages but this Court reversed and sent it back for more discovery (more pages). (See 441 US 176) The instant case has had only about 55 pages of deposition.

The recent (March 26, 1980) Maryland Court of Appeals (Berkey vs. Dalia, 1980) decision has defined a similar standard for Libel cases.

Taking the "Herbert Standard" in mind I conclude that the District Court did not know the "motive" "intent" and "state of mind of the publishers.

2. Did this publication of scandalous allegations which threatened public safety comprise a reckless disregard for truth?

Publishers have already conceded that the publication dealt in part with the subject of sex perverts driving ice cream trucks. This is ridiculous nonsence for MISSION: IMPOSSIBLE. Obviously, publishers knew the allegation was false. This Court defined reckless disregard in:

ST. AMANT *v.* THOMPSON.

390 U. S. 727, 732

Opinion of the Court.

> The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Publishers fabricated a story and cleverly edited it to get the idea across.

In addition, since a threat to public safety was a foreseeable consequence of publication, which endagered the constitutional rights of the public we argue that publishers showed a reckless disregard for truth.

3. Does the "Times Standard" apply to this case?

The only case relied on by the District Court to determine conditional immunity was (Marchesi vs. Franchino 283 Md. 131, 1978). The District Court stated the wrong reasons for conditional immunity being granted in that case.(see page A3) The reason the Maryland Court granted it was because of "their employee/employer relasionship". On the opposite page I have reproduced a page of that opinion. The last sentence states it. In Maryland case law, no conditional immunity = no "Times Standard".

Obviously, the employee/employer relasionship had no application to the instant case.

allegedly resulted in a criminal conviction against Franchino. On reporting the entire matter to Smith, Marchesi turned over to him certain notes of a suggestive nature which she had received from Franchino. Claiming that it was Marchesi, not she, who had sought the intimate relationship, Franchino, on being confronted by the allegations, nevertheless did not deny having had a romantic interest in Mrs. Marchesi.

Concerned not only for Marchesi's safety, on the strength of her allegations, but also for the proper administration and discharge of his department's responsibilities, Smith dispatched two other employees to New Jersey to determine whether the report of the prior criminal conviction was accurate. This investigation revealed that Franchino had been arrested on a minor assault charge instituted by a co-worker and, on being convicted, had been fined $25 plus court costs. After receiving this information and interviewing Marchesi and Franchino separately, Smith directed to the State Medical Adviser a written summary of these various developments together with a request that Franchino receive an appropriate medical examination, including the possibility of "psychiatric consultation." Marchesi was subsequently transferred at her own request to another office of the Department in a nearby county. Meanwhile, Franchino, who not only remained at the Baltimore office but was apparently promoted, commenced this action for defamation.

At the conclusion of the evidence at trial, the court submitted to the jury not only the question whether the plaintiff had been falsely defamed, but, having determined as a matter of law that the defendants were protected by a conditional privilege "because of their employee/employer relationship,"

The Gertz decision states that the "Times Standard" may not be applied to private individuals. (Gertz vs. Welch 418 US 323)

> Court of Appeals affirmed. *Held:*
>
> 1. A publisher or broadcaster of defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim the *New York Times* protection against liability for defamation on the ground that the defamatory statements concern an issue of public or general interest. Pp. 339–348.

because the First Amendment objective, truth over error, would be defeated. First Amendment prohibits "Times Standard" application.

CONCLUSION

It is generally agreed that inaccurate information in the press has caused great harm and damage to the United States and our people in recent years. Libel law has been unclear inviting reckless publication.

Does freedom of speech extend to the false and reckless 'cry of fire in a crowded theatre' which threatens public safety.

The opportunity is at hand.

The Writ should be granted.

Respectfully Submitted,

Lewis C. Sparks

Lewis C. Sparks,
Petitioner

APPENDIX A1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEWIS C. SPARKS, Plaintiff, vs. THE WESTERN SHORE PUBLISHING CORPORATION and GABRIELE BARMASH, Defendants.	)	Civil Action No. 78-1665

FILED
FEB 8 1979
JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

Plaintiff brought this action for libel against the defendants as the publishers of allegedly false and defamatory articles appearing in The Maryland Independent on May 18 and May 25, 1978. In addition, plaintiff's complaint charges defendant Gabriele Barmash with slander for statements she made to others concerning the allegedly defamatory article of May 18, 1978. This matter is now before the Court upon the defendants' motions for summary judgment. Upon consideration of the pleadings filed in this action, and having concluded that there is no genuine issue of material fact in dispute, we grant defendants' motions for summary judgment.

The two articles complained of pertain to incidents concerning two vendors, one described as having an "orange-colored VW bus" and the other described as having a "yellow truck." In the disputed articles, the author, defendant Barmash, described one incident in which the vendor owning the Volkswagen bus was observed throwing candy at children, and another in which one of the two vendors was reported to have sold cigarettes to children in violation of Maryland law. In the Spring of 1978, the plaintiff was engaged in the business of vending ice cream, candy and sodas from a yellow VW bus. Plaintiff contends that he was identifiably the vendor described in the article as owning an "orange-colored VW bus."

I. Libel

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court vested the states with the task of defining the appropriate standard of liability for publishers of defamatory falsehoods injurious to private individuals. The state law governing the case at bar is that of Maryland, the law of the forum in which the libel and slander was allegedly published and in which the plaintiff's injury is alleged to

have occurred. See Myers v. Gaither, 232 A.2d 577 (D.C. 1967) (applying grouping of contacts theory of conflicts). Maryland law, therefore, provides the appropriate standard of liability applicable to these defendants.

The law of Maryland recognizes a conditional immunity against civil liabililty for defamation by a publisher if he, in good faith, publishes a statement in furtherance of his own legitimate interest or those shared in common with others, or if the published statement is of interest to the public in general. Marchesi v. Franchino, 283 Md. 131, 138, 387 A.2d 1129, 1131(1978). In order to defeat Maryland's conditional immunity, a plaintiff must prove that the defendants acted with "malice" in publishing the defamatory material. Id. In defining "malice," the Maryland Court of Appeals has adopted the New York Times v. Sullivan standard requiring that a plaintiff prove that the defendant acted "knowing the publication to be false or with a reckless disregard for the truth." Id. at 1133; see New York Times v. Sullivan, 376 U.S. 254, 286-87 (1964).

It is abundantly apparent from the pleadings and affidavits filed in this case that the defendants qualify for Maryland's conditional

immunity protecting those who, without malice, publish matters of public and personal concern. Obviously, the nature and legality of products sold by vendors to children is a matter of public concern. Moreover, the writer of the article, as a mother of four, has the legitimate personal interest in the welfare of her own children to bring the articles within Maryland's test for conditional immunity. Accordingly, the plaintiff in this case has the difficult burden of establishing that the articles were published with a reckless disregard for the truth.

Upon examination of the articles complained of and the affidavits of the parties, we find, as a matter of law, that the defendant did not publish the articles with the reckless disregard for the truth required for a finding of malice. The articles published were written as a result of the author's own investigation of the incidents described. The uncontested fact that a vendor with a yellow truck was eventually tried and convicted of selling cigarettes to minors in Maryland as a result of the author's investigations belies any notion that the statements reporting the incidents were made with a reckless disregard for the

Even absent the need to show malice, the plaintiff could not, under the circumstances, establish that the statements made in the articles are defamatory with respect to this particular plaintiff. We are persuaded, therefore, that, as a matter of law, summary judgment must be entered for the defendants with respect to plaintiff's allegations of libel.

II. Slander

In his complaint, plaintiff alleges that defendant Barmash, while explaining her article of May 18, 1978 to others, falsely stated that "plaintiff poisoned or drugged food products before selling them." By affidavit, defendant Barmash denies having personally knownthe plaintiff prior to the filing of the complaint. In hi his his opposition to defendant Barmash's motion to dismiss, plaintiff fails to contest, by affidavit or otherwise, Mrs. Barmash's denial of the alleged slander. Nor does the plaintiff contest that Mrs. Barmash did not personally know the plaintiff prior to the filing of his complaint.

In Maryland, the prerequisites to the recovery for for slander are identicle to those for libel. Marchesi v. Franchino, supra, at 138; Jacron Sales Co Sales Co. v. Sindorf, 276 Md. 580, 350 A. 2d 688, 695 (1976). Furthermore, Maryland's conditional

immunity for statements of public or general concern has been extended to non-media defendants and media defendants alike. Jacron Sales Co. v. Sindorf, supra, at 695-96. In the instant case, the statements attributed to the defendant Barmash by the plaintiff relate to matters of obvious public concern and personal concern to the defendant. Accordingly, the plaintiff must establish that defendant Barmash's statements were made with malice in order to defeat the defense of defendant's conditional immunity. Plaintiff, however, has failed to set forth facts, beyond the allegations of his complaint, to establish that statements allegedly made by Mrs. Barmash were false or that they were defamatorywith respect to the plaintiff. In the absence of contradicting affidavits, we may accept the truth of the facts as stated in Mrs. Barmash's affidavit. Federal Rules of Civil Procedure 56(e). We therefore conclude that plaintiff ha has failed to present facts that would establish the prerequisites to a recovery for slander. The defendants are accordingly entitled to Summary judgment. An order consistant with the for foregoing has been entered this day.

John H. Pratt
United States District Judg

A 7

1. UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Lewis C. Sparks, Appellant No. 79-1451
vs.
The Western Shore Publishing Corp. et al.

affirmed—no opinion—per curium
Feb. 6, 1980
Hon. C. J. s Robb, Wilkey, and Wald

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2. same head as #1 (No. 79-1451)

Petition for rehearing denied
March 27, 1980
Hon. C. J. s Robb, Wilkey, and Wald

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3. same head as #1 (No. 79-1451)

Suggestion for hearing en banc denied
March 27, 1980

Hon. Chief J. Wright Hon. C. J. s McGowan Tamm, Robinson, Mackinnon, Robb, Wilkey, Wald, Mikva and Edwards

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Lewis C. Sparks, Plaintiff C. A. NO.
vs. 78-1665
The Western shore Publishing Corp. et al.
ORDER
Summary Judgment granted Feb 7, 1979

Hon. John H. Pratt
United States District Judge

Marlton News Line

by Gabriele Barmash
952-0653

Candy, cigarettes, what else?

A serious problem involving ice-cream and candy vendors has come to our attention! Recently two vendors arrived in our community causing concern among residents. An orange-colored VW Bus vendor was observed throwing candy at children, and giving the kids "free" candy. The other vendor drives a yellow truck, parks his vehicle by the cross-walk on Heathermore, and waits for the kids when they come from school.

A more serious problem developed when children told school authorities that the vendor also sold cigarettes to the kids. A police report was filed on May 11 and charges will be pressed to prevent the sale of additional cigarettes to children. Legal action has been taken by an individual resident and further avenues of investigation are being pursued by the Health and Safety Committee of C.A.M.

Two county council members have been notified that the Huckster's Bill needs changes. At present, anyone may apply for this license over the counter — no police check is done — and the license can be obtained from anywhere outside this county.

The committee feels that people whose primary clients are children should be thoroughly investigated, and that licenses to sell cigarettes should not be granted to individuals whose trade caters to children. This is the first time that the State's Attorney's Office has dealt with the prosecution of a vendor selling cigarettes to minors. It is hoped that this initial action will prompt more concerned involvement from private citizens and authorities alike.

We need the help of the community to protect our children in this matter. Anyone willing to make phone calls, write letters, or attend hearing is asked to call Margaret MacGlean (868-7169).

↑
ABOVE

Newspaper Article of May 18, 1978

AT LEFT ——————→

Statement of Chief Counsel Charles V. Kirchman that his clients article deals with the subject of sex perverts driving ice cream trucks

The articles also discussed the fact that truck vendors who were in daily contact with elementary school children were not subject to any police check as to past criminal activity prior to licensing. Without imputing any aberrations to the Plaintiff, it must be admitted that a real possibility exists that a sexual psychopath might utilize a truck vending business attractive to children as a means to secure access to them. The Defendant submits that a newspaper has both a right and a duty to fairly comment on such an important subject and to attempt to show its readers how legislative reform could be effected. Indeed, the ultimate justification of its action in this regard--if one be needed--is shown by the fact that the citizens complaints so generated resulted in an ordinance being passed by the Prince George's County Council requiring background investigations of truck vendors prior to their licensing. The Plaintiff's contention that merely because he is a truck vendor that the article in the Maryland Independent discussing this matter in a general fashion somehow accuses him of such tendencies and practices is devoid of merit.